

No. _____ 05-760 DEC 7 - 2005

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In The
Supreme Court of the United States

KEVIN SHARP ENTERPRISES, INC.,

Petitioner,

v.

STATE OF ALABAMA, *EX REL.* TYSON,

Respondent.

**On Petition For A Writ Of Certiorari
To The Alabama Court Of Civil Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether undisputed ownership is a sufficiently protected property interest under the Fourth Amendment to allow the owner of seized property to challenge the validity of the warrant under which the property was seized.

II. Whether, consistent with due process, seized property may be forfeited based on the application of a post-seizure judicial decision which invalidated a statutory exception to a controlling criminal statute.

PARTIES TO THE PROCEEDING

Petitioner is Kevin Sharp Enterprises, Inc., a Tennessee corporation. Respondent is the State of Alabama.

CORPORATE DISCLOSURE

Kevin Sharp Enterprises, Inc., is privately held; none of its shares are held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Sharp Enterprises, Inc. ("Kevin Sharp" or "Petitioner") prays that a writ of certiorari issue to review the judgment of the Alabama Court of Civil Appeals in this case.

OPINIONS BELOW

The June 3, 2005, opinion of the Alabama Court of Civil Appeals is unpublished. The opinion is reproduced in full in the Appendix. *See App. 1-15.* The September 9, 2005, order of the Alabama Supreme Court denying discretionary review is also unpublished. The order is reproduced in full in the Appendix. *See App. 19.*

STATEMENT OF JURISDICTION

Kevin Sharp seeks review of the June 3, 2005, opinion of the Alabama Court of Civil Appeals. The Alabama Supreme Court denied discretionary review of that decision on September 9, 2005. This Court has jurisdiction to review the decision of the Alabama Court of Civil Appeals under 18 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violence, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 2001, Kevin Sharp placed video amusement games in two arcades in Mobile County, Alabama. The games were supplied to the arcades for operation under the Alabama Amusement Games Act (the "Amusement Act" or "the Act"), Ala. Code § 13A-12-76.¹ The plain language of the Amusement Act allowed, as exceptions to the state's gambling laws, "coin operated machine[s] or device[s] designed for bona fide amusement purposes which, by application of some skill," entitled the player to limited rewards or replays. Ala. Code § 13A-12-76. Kevin Sharp conformed its games to the plain language of the Amusement Act and to prior judicial interpretations of the Act.

However, on May 3, 2001, search warrants were issued for both arcades. The warrants were issued based upon two virtually identical affidavits given by Dale Leddick, an investigator for the Mobile County District Attorney. Leddick's affidavits claimed that a police officer, Mary Kountz, and a "confidential source" had observed "illegal gambling devices and/or slot machines" being used at both arcades. The warrants were executed on the same day that they were issued, and Kevin Sharp's video amusement games were seized from the arcades.

On June 7, 2001, Respondent filed a complaint, under Ala. Code § 13A-12-30,² to forfeit the games seized from the first arcade as gambling devices or slot machines. Also on June 7, 2001, Respondent filed a separate complaint,

¹ The text of the Act is reproduced in full in the Appendix. See App. 20-24.

² The text of Ala. Code § 13A-12-30 is reproduced in full in the Appendix. See App. 20.

under the same statute, to forfeit the games seized from the second arcade. The cases were consolidated upon Kevin Sharp's motion in December of 2001.

Following discovery, on October 7, 2003, Kevin Sharp moved for summary judgment and argued that its games came within the Amusement Act's exception for coin-operated amusement devices. In its summary judgment brief, Kevin Sharp addressed the recent decision of the Alabama Court of Civil Appeals in *State v. Ted's Game Enters.*, 893 So. 2d 355 (Ala. Civ. App. 2002) ("*Ted's I*"), which held that the Act's exception to the criminal gambling laws for games requiring "some skill" violated Alabama's prohibition against lotteries and that games must be "skill predominant" to avoid the lottery prohibition. Kevin Sharp argued that application of the change announced in *Ted's I* to allow forfeiture of its games would violate the "ex post facto principle" or "right to fair warning" guaranteed under the Alabama Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. See Petitioner's Mot. for Summ. J. 6-14. Kevin Sharp supplemented its summary judgment motion on October 22, 2003, to assert that the warrants under which the games were seized were issued without probable cause in violation of the Fourth Amendment to the United States Constitution and, therefore, that the games should be suppressed. See Petitioner's Supp. Sub. 1-2.

On July 21, 2004, Respondent also moved for summary judgment. The basis for Respondent's summary judgment motion was the decision of the Alabama Supreme Court in *Ex parte Ted's Game Enterprises*, 893 So. 2d 376 (Ala. 2004) ("*Ted's II*"), which affirmed the decision of the Alabama Court of Civil Appeals in *Ted's I*. See Respondent's Mot. for Summ. J. 2. Subsequently, the trial

court denied Kevin Sharp's motion for summary judgment and granted summary judgment in favor of Respondent on September 1, 2004.³

Kevin Sharp then timely appealed to the Alabama Court of Civil Appeals and repeated its two major arguments from the lower court. First, Kevin Sharp challenged the propriety of the seizures based upon the lack of probable cause to support the underlying warrants. *See* Petitioner's Br. 14-21. Although the Respondent argued that Kevin Sharp lacked standing to challenge the warrants, Kevin Sharp asserted that its undisputed ownership of the seized games provided a sufficient property interest to allow it to contest the warrants under the Fourth Amendment. *See* Respondent's Br. 4-5; Petitioner's Reply Br. 9-10. Second, Kevin Sharp argued that application of the "skill predominant" standard announced in *Ted's I* and *Ted's II* violated the right to fair warning guaranteed by the due process clauses of the Alabama Constitution and the United States Constitution because application of the new standard would penalize Kevin Sharp for conduct that was lawful at the time it occurred. *See* Petitioner's Br. 22-40. However, the Alabama Court of Civil Appeals disagreed with Petitioner and held that Kevin Sharp lacked standing to challenge the warrants under which its property was seized and that Kevin Sharp's due process rights had not been violated. *See* App. 6, 14-15.

Kevin Sharp then filed a timely petition for certiorari with the Alabama Supreme Court and repeated its arguments to the Alabama Court of Civil Appeals. The

³ The trial court's order is reproduced in the Appendix. *See* App. 16-18.

Alabama Supreme Court denied the petition for a writ of certiorari without opinion on September 9, 2005. *See App. 19.* Kevin Sharp now petitions this Court to issue a writ of certiorari to review the decision of the Alabama Court of Civil Appeals.

REASONS FOR GRANTING THE WRIT

This Court should grant Kevin Sharp's petition for a writ of certiorari on both issues because the Alabama Court of Civil Appeals fundamentally misapplied the controlling law and because the precedents of this Court require clarification to avoid future misapplications.

I. Whether undisputed ownership is a sufficiently protected property interest under the Fourth Amendment to allow the owner of seized property to challenge the validity of the warrant under which the property was seized.

This Court should grant Kevin Sharp's petition for a writ of certiorari with regard to the seizure of Petitioner's video games because, in holding that Kevin Sharp lacked standing to challenge the warrants under which its property was seized, the Alabama Court of Civil Appeals misinterpreted this Court's Fourth Amendment precedent in two respects. First, it applied a concept of standing, which this Court has rejected, rather than looking at whether Kevin Sharp's property rights in the games are among those rights protected under the Fourth Amendment. Second, the Alabama Court of Civil Appeals failed to recognize that property rights are protected under the